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No. 88-1727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VIDEO INTERNATIONAL PRODUCTIONS, INC.,
Petitioner,

—v.—

WARNER-AMEX CABLE COMMUNICATIONS, INC.
and THE CITY OF DALLAS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT WARNER-AMEX CABLE COMMUNICATIONS INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit properly held that Respondent Warner-Amex Cable Communications Inc. ("Warner") was protected from antitrust, civil rights and common law tort liability in this case by the First Amendment because Warner simply petitioned the City of Dallas ("City") to enforce existing laws, and because there was no evidence at trial that Warner or the City of Dallas engaged in any corrupt activity, or that the governmental process was corrupted in any way.

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Respondent Warner-Amex Cable Communications Inc.[1] ("Warner") respectfully submits this brief in opposition to the petition for a writ of certiorari of Video International Productions, Inc. ("VIP").[2]

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1 Respondent Warner-Amex Cable Communications Inc. is wholly-owned by Warner Communications Inc. Warner Communications Inc. or its wholly-owned subsidiaries own more than twenty percent of the common stock of Atari Corporation. In March 1989, Warner Communications Inc., and Time Inc. proposed to merge their companies, but that merger proposal has not been presented yet to their shareholders.

2 The City of Dallas recently submitted a petition for a writ of certiorari in this case on March 10, 1989. That petition was denied by this Court on May 2, 1989.

COUNTERSTATEMENT OF THE CASE[3]

VIP's claims against Warner for alleged violations of the antitrust and civil rights laws, and the Texas common law, were based entirely on evidence that after Warner bid for, and won, a cable franchise in Dallas, Warner engaged in petitioning and lobbying activities related to that franchise. There was no proof of any corrupt conduct by Warner or by any City administrators, nor was there any evidence that the governmental process was corrupted in any way.

A. Competition to Receive a Dallas Cable Television Franchise

In 1979, the Dallas City Council solicited bids for a cable television franchise in Dallas by issuing a Request for Proposals ("RFP") prepared by an independent consultant. At least six companies, including Warner (but not VIP), submitted proposals. The nine-member City Council voted to award the franchise to Warner in November 1980, and thereafter approved the franchise agreement.

The franchise award and agreement were the subject of a public referendum held on April 4, 1981, and were approved overwhelmingly by Dallas voters. The franchise agreement was then adopted as Dallas Ordinance No. 16738.[4] Section 7 of the franchise agreement contained a cable franchise provision, included at the suggestion of the City's independent consultant, which read:

> "No [cable television] system shall be allowed to occupy or use the streets of the City or be allowed to operate within the City without a [cable television] franchise."

Although VIP challenged the lawfulness of Section 7 on appeal, it offered no evidence at trial that the franchise agreement, or any of its provisions, was unlawful or that Warner or any City official knew that the franchise agreement was unlaw-

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3 This statement relies solely on evidence that was uncontroverted at trial.

4 VIP's petition incorrectly implies that the franchise agreement was enacted as an ordinance in November 1980. *See* VIP petition at 4.

ful. Nor did VIP ask that the jury be charged regarding the lawfulness of any of the provisions of that agreement. Further there was no evidence at trial that the City's franchise procedures were in any way improper, or that Warner was involved in any corrupt or unlawful activity in the franchising process.

B. Warner's Petitioning and Lobbying Activities

1. Opposition to a Proposed Amendment to the Zoning Laws

VIP complained of communications between Warner and the City which took place in late April and early May 1981 concerning a request by Silver Screen Company ("Silver Screen"), a company unaffiliated with VIP, that the Dallas Zoning Ordinance Advisory Committee ("ZOAC") recommend amending the Accessory Use provision of the Dallas zoning law. Silver Screen's proposed amendment would have enabled commercial, unfranchised cable television operators such as Silver Screen to cross property lines in residential neighborhoods; that is, to run cables from an operator's earth station on one residential lot across property lines to adjacent residential lots that were under different ownership.[5] Silver Screen sought this amendment because the Dallas Board of Adjustment had affirmed, in March 1981, a Dallas building official's determination that the Accessory Use provision could not be relied upon to permit commercial cable television operators to lay cables across property lines in residential areas.[6]

The communications complained of by VIP were limited to three meetings between Warner representatives and responsible City administrators regarding the nature of the proposed

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5 Historically, the Accessory Use provision of the Dallas Development Code authorized otherwise prohibited activities in residential areas if they were "accessory" to the principal permitted use and were located on the same lot. "Accessory uses" include swimming pools, garages, worksheds, etc., which are "customarily incidental" to the main residential use of the land.

6 Warner had no communications with the building official with respect to this determination, and did not participate in the Board of Adjustment proceeding.

amendment, its potential impact on Warner's franchise, and Warner's opposition to the proposed amendment. At those meetings, Warner opposed the change.

On May 18, 1981, ZOAC held a public hearing on the proposed amendment, and heard from all interested parties, including counsel for Silver Screen, outside counsel representing Warner, and City administrators. ZOAC then deliberated privately, and voted not to recommend the amendment. No ZOAC member spoke privately with any Warner representative at any time regarding the proposed amendment.

2. Communications with Officials Regarding VIP's Apparent Violations of the Zoning Laws

VIP also complained that, in June 1981, Warner requested City administrators to investigate whether VIP was operating in violation of the Dallas zoning laws. Warner's request was based on VIP's public application to the Federal Communications Commission ("FCC") for a microwave (CARS) license, which suggested that VIP was transmitting television programming via cable across property lines in residential areas, in violation of Dallas zoning law.

The Dallas building official responsible for enforcing zoning regulations conducted an independent investigation, and confirmed that VIP's facilities in residential districts were crossing property lines in violation of the zoning law, as that law had been interpreted in the prior rulings by ZOAC and the Board of Adjustment. Accordingly, in September 1981, the City issued zoning violation notices to VIP. During the City's investigation, Warner made intermittent inquiries as to its status. VIP was not denied access to public officials during this process, and there was no evidence of any improper or illegal conduct by Warner or City officials.

3. Warner's Petition for Permission to Provide Interim Cable Service

VIP's evidence also included a written petition that Warner filed with the City Council on September 2, 1981, requesting

authority to provide cable service in the North Dallas area sooner than contemplated by the franchise agreement's schedule. At the time, VIP and other companies had begun providing cable service to apartment complexes in North Dallas and were seeking to sign additional complexes to exclusive ten-year contracts. Warner sought permission to compete in the North Dallas area before it was foreclosed by its competitors' exclusive contracts.

There was no evidence that Warner or the City Council engaged in any corrupt, unlawful or unauthorized activity regarding this petition. Nor was there any evidence that VIP (or any other competitor) was denied access to the City Council to oppose Warner's petition, which was a matter of public record and debate.

4. Warner's Opposition at the FCC to the Transfer of VIP's CARS License

Finally, VIP complained that Warner filed written comments opposing VIP's application to the FCC for authority to transfer VIP's newly-acquired CARS microwave license to a company known as Cable Dallas, Inc. ("Cable Dallas"). Warner's comments were submitted pursuant to FCC procedures that invite public reaction. *See* 47 U.S.C. § 309. Prior to any FCC action, VIP withdrew its application, and voluntarily relinquished its CARS license.

C. The District Court's Decision

Following a jury verdict against Warner and the City, the District Court granted Warner's motion for judgment n.o.v. The District Court held that Warner's conduct was protected by the First Amendment principles enunciated in the *Noerr-Pennington* doctrine from any liability under the antitrust laws, the civil rights laws, or Texas common law, because Warner "simply urged the City to enforce the law as the City had decided to interpret it." VIP Petition ("VIP Pet.") at 45a. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v.*

Pennington, 381 U.S. 657 (1965).[7] The District Court recognized, after a careful review of all the evidence, that there was nothing in the record to support VIP's claims that Warner was engaged in any "sham" petitioning, or that Warner was engaged in an unlawful conspiracy with the City that might eliminate *Noerr-Pennington* protection. *See* VIP Pet. at 45a-46a.

D. The Court of Appeals' Decision

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision, holding that Warner could not be liable to VIP under the antitrust laws and the common law because the evidence showed that Warner was simply "exercising its First Amendment right to petition the government, and this was fully protected by the *Noerr-Pennington* doctrine." *See* VIP Pet. at 15a-16a.

The Court of Appeals rejected VIP's argument that there was evidence to support an exception to the *Noerr-Pennington* doctrine. The Court reasoned that the "sham" exception to the *Noerr-Pennington* doctrine would only apply if Warner had not engaged in its petitioning activity to achieve a goal other than to force VIP to waste time and money defending itself. In this case, however, it was virtually conceded that Warner's petitioning and lobbying was designed to achieve its stated goal of

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7 In support of its decision, the District Court cited, *inter alia*, *Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984) (private citizens who persuaded county officials to open a road across plaintiff's property were entitled to First Amendment immunity from plaintiff's federal and state law claims); *Gorman Towers, Inc. v. Bogosalvsky*, 626 F.2d 607, 614 (8th Cir. 1980) (First Amendment immunity under section 1983 for lobbying activities that led to amendment of zoning laws); *Pendleton Constr. Corp. v. Rockbridge County*, 652 F. Supp. 312, 324-25 (W.D. Va. 1987), *aff'd*, 837 F.2d 178 (4th Cir. 1988) (lobbying efforts to oppose issuance of special use permits under the zoning laws were immune from liability under antitrust laws and section 1983); and *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892, 912 (D. Md. 1985), *aff'd per curiam*, 786 F.2d 202 (4th Cir. 1986) (private party's petition to government to deny competitor's zoning application was immune from claims under section 1983 and state law).

enforcing the Dallas zoning laws. VIP Pet. at 13a. The Court of Appeals also concluded that a so-called "co-conspirator" exception to the *Noerr-Pennington* doctrine did not apply because there was no evidence of a "corrupt conspiracy" between Warner and the City; that is, VIP failed to prove that a City official had been influenced by Warner through some corrupt means. VIP Pet. at 13a.

Finally, the Court of Appeals reasoned that Warner, as a private party, could not be liable under the civil rights laws, 42 U.S.C. § 1983, unless there was evidence that it acted under color of state law to deprive VIP of its constitutional rights. VIP Pet. at 15a. Although VIP argued that an illegal conspiracy existed between Warner and the City, the Court recognized that Warner's successful petitioning and lobbying activities did not establish that Warner was acting under color of state law as a "co-conspirator" with a City official. VIP Pet. at 16a. Relying on this Court's decision in *Dennis v. Sparks*, 449 U.S. 24 (1980), the Fifth Circuit concluded that there must be evidence of a "corrupt conspiracy", such as that required to abrogate *Noerr-Pennington* protection, to support a finding that Warner's petitioning and lobbying activities amounted to conduct under color of state law. The Fifth Circuit recognized that no such evidence existed as to Warner.

REASONS FOR DENYING THE WRIT

VIP's petition attempts to create a novel issue for review from a very routine decision by the Court of Appeals. The decision below simply applied the *Noerr-Pennington* doctrine to VIP's claim that Warner's petitioning and lobbying conduct violated the antitrust laws and Texas common law, and further held that VIP could not circumvent the *Noerr-Pennington* doctrine by alleging that Warner's petitioning amounted to activity "under color" of state law that deprived VIP of its rights under 42 U.S.C. § 1983. Although VIP argues that this decision establishes a new affirmative defense of "good faith immunity" under the civil rights laws, the Court of Appeals' reasoning in fact recognizes only that Warner cannot be held liable

merely for being on the "winning side"; there must also be evidence that a "corrupt conspiracy" existed between Warner and the City in order to eliminate *Noerr-Pennington* protection and to establish that Warner acted under color of state law. In sum, nothing in the Fifth Circuit's opinion, which is based on the specific facts of this case, presents an issue that is appropriate for review by this Court.

POINT I

THE COURT OF APPEALS' DECISION DOES NOT PRESENT ANY ISSUE REGARDING AFFIRMATIVE DEFENSES OR IMMUNITIES AVAILABLE TO PRIVATE PARTIES UNDER SECTION 1983

VIP's petition argues that the Court of Appeals improperly created an "affirmative defense or an immunity" when it relied on the subjective motivation of the City in rejecting VIP's claim against Warner under 42 U.S.C. § 1983. VIP also asserts that there is a conflict in the various federal circuit courts of appeal on this issue. This argument is no more than a futile effort to invent an issue for review, because the subject of affirmative defenses or immunities under section 1983 was not reached by the lower courts.

The Fifth Circuit's decision on VIP's section 1983 claim was limited to whether Warner acted "under color" of state law. The Court reasoned correctly that "[i]n order for a private party to be liable under section 1983, it must have acted under color of state law," and that Warner's "first amendment petitioning of the City does not constitute action under color of state law unless [Warner] acted as a co-conspirator with the City" by influencing City officials "through some corrupt means." *See* VIP Pet. at 15a-16a; 13a. *See also Dennis v. Sparks*, 449 U.S. 24, 28 (1980); *Affiliated Capital Corp. v. Houston*, 735 F.2d 1555 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053 (1986).

After reviewing the evidence in the light most favorable to VIP, the Court of Appeals concluded that there was no proof

of an illegal conspiracy. The Court found nothing in the record to suggest any corrupt activity by Warner, *or* any evidence that City officials had any selfish, venal or otherwise corrupt motives, or acted in a manner not consistent with the City's interests. *See* VIP Pet. at 13a, 16a. In sum, the Court surveyed both the objective and the subjective evidence produced by VIP, and determined that there was nothing to support VIP's conjecture that the City and Warner were "jointly engaged" in a scheme to deprive VIP of its constitutional rights. *See* VIP Pet. at 11, 15a.

Because the Fifth Circuit decided that Warner was not acting under color of state law, it was unnecessary for the Court to address any questions concerning an affirmative defense of "good faith immunity" under 42 U.S.C. § 1983. VIP's reference to cases raising questions concerning this good faith immunity defense, in an effort to create a conflict among the circuits, is misplaced. *See* VIP Pet. at 10-11. Moreover, these cases are inapposite because none of them involved a claim that petitioning and lobbying activities by a private party amounted to a conspiracy with a state official. Most of the cases cited by VIP presume that a private party has acted under color of state law by setting in motion an unconstitutional pre-judgment attachment or garnishment process, and address whether the private party is entitled to an affirmative good faith immunity defense. By contrast, VIP's claim here is not that Warner directly exercised state authority, but that Warner's petitioning and lobbying somehow amounted to a corrupt attempt to influence City officials to enforce the zoning ordinance against VIP. The good faith immunity decisions relied on by VIP simply do not address this claim.[8]

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8 Again endeavoring to create a "conflict," VIP argues in a footnote that the Court of Appeals' decision here is inconsistent with its earlier decision in *Folsom Investment Co. v. Moore*, 681 F.2d 1032, 1037-38 (5th Cir. 1982). VIP never raised this argument in its application for rehearing in the Court below. The issue is not subject to review in this Court. *City of Springfield v. Kibbe*, 480 U.S. 257, *reh'g denied*, 481 U.S. 1033 (1987); *E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19, 25 n.1 (1986).

(*Footnote continues on the following page*)

POINT II

THE FIFTH CIRCUIT'S DECISION WAS BASED ON SOUND REASONING AND PRECEDENT

VIP next argues that there are "four significant errors in the Fifth Circuit's reasoning." VIP Pet. at 12. This argument not only fails to present an issue suitable for review by this Court, it also lacks foundation in the record.

According to VIP, the Court of Appeals' first error was to give undue deference to Warner's First Amendment right to petition the government. To support this theory, VIP ignores the evidence at trial, and fancifully insists that Warner's right to petition "is due considerably less deference when it entered into a conspiracy with a governmental entity in a fraudulent or illegal scheme." VIP Pet. at 12. However, both the District Court and the Court of Appeals, after a thorough review of the record, found no evidence to support this claim of a "fraudulent or illegal scheme." Nor does VIP's factual recitation identify such evidence. The Fifth Circuit properly recognized Warner's First Amendment rights when the proof at trial demonstrated that it was engaged only in legitimate petitioning and lobbying activities.

The Court of Appeals also erred, in VIP's view, when it "misread *Dennis v. Sparks*, 449 U.S. 24 (1980)." VIP Pet. at 12-13. However, the Fifth Circuit's decision merely quotes the *Dennis v. Sparks* case for the unremarkable proposition that a private party which petitions the government cannot be deemed to have conspired with a state official simply because the private party is on "the winning side"; rather, there must be proof of a "corrupt conspiracy," such as one involving bribery of a

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In any event, the *Folsom* decision has no relevance to VIP's claim of a corrupt conspiracy, because it considers only whether a private party may claim an affirmative defense of good faith immunity for innocently invoking a seemingly valid, but in fact constitutionally infirm, state law. *Folsom* does not consider whether a private party has acted under color of state law simply when it successfully petitions and lobbies the government.

state official, to establish that a private party was "jointly engaged" in prohibited action. *Id.* at 28. These principles are not only well supported by *Dennis v. Sparks*, they are essential to protect a private party's right to petition the government under the First Amendment. *United States v. Hylton*, 710 F.2d 1106, 1111 (5th Cir. 1983), *quoting United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) (First Amendment right to "petition for redress of grievances . . . among the most precious of the liberties safeguarded by the bill of rights"); *Stern v. United States Gypsum*, 547 F.2d 1329, 1342 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977) (fact that citizen's grievance motivated by financial self-interest does not weaken right to petition where right is "logically implicit in and fundamental to the very idea of a republican form of government").

VIP next asserts that the Fifth Circuit failed to recognize the "corruption" established by the City's decision to enforce long-standing zoning laws against VIP. *See* VIP Pet. at 13. Although VIP characterizes the City's enforcement of the existing zoning laws as "misuse of City power for non-governmental ends," the record shows that restrictions on "accessory uses" and commercial television operations in residential areas were fully consistent with long-standing Dallas zoning regulations, and independent determinations by City officials interpreting these regulations. VIP Pet. at 5a-7a; 45a. Moreover, no City official stepped outside the scope of their authority in enforcing these zoning laws against VIP. VIP Pet. at 47a. Accordingly, the Fifth Circuit did not overlook any "corruption," because none existed.

Finally, VIP argues that the Fifth Circuit erred when it focused on "the subjective motivation of the City actors" in considering VIP's section 1983 claim against Warner. As discussed above, the Court considered whether there was either objective *or* subjective evidence of an illegal conspiracy that would support a claim that Warner was acting under color of state law. The Court of Appeals recognized initially that there was no objective evidence, such as bribery, coercion or other improper influence, to support an inference of conspiracy. VIP

Pet. at 13a. Then, the Court recognized that there was no subjective evidence—such as a City official's "selfish or otherwise corrupt motive"—the "minimum" required by the case law to give rise to such an inference. VIP Pet. at 15a-16a; 13a. Having failed on both counts, VIP cannot now allege that the Fifth Circuit's thorough review had an improper "focus."[9]

POINT III

VIP'S NOVEL TEST FOR NOERR-PENNINGTON ANALYSIS HAS NO MERIT

VIP also urges that the Court of Appeals' analysis of whether Warner acted under color of state law for purposes of section 1983, and whether Warner was protected from antitrust and common law liability under the *Noerr-Pennington* doctrine, should have been based on whether Warner "knew or should have known" that the action it sought was illegal or improper. *See* VIP Pet. at 15. VIP cites no authority for this novel proposition and it has no merit under the circumstances here.

VIP presented no evidence to the jury, and the jury was never charged, with respect to whether the provisions of the publicly-endorsed cable franchise, or the City's independent interpretation of the zoning laws, were illegal or improper. Similarly, VIP did not offer any evidence that Warner "knew or should have known" of any illegality or impropriety. As a result, the jury could not properly have reached a verdict based on this test, and the Fifth Circuit could not have employed it even if it were valid.

Further, VIP's "knew or should have known" test is fundamentally inconsistent with the First Amendment and principles of federalism. If a private party cannot petition or lobby the government for a particular goal without first determining that

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9 VIP's fifth (unnumbered) assertion of error—that the Court of Appeals improperly rejected the argument that Warner would be subject to section 1983 liability if it knew or should have known what it was seeking from the City was illegal or improper—is discussed in Point III, *infra*. *See* VIP Pet. at 14.

the goal is neither "illegal" nor "improper," First Amendment activity will be substantially chilled. In addition, federal courts will be barraged with collateral challenges to the decisions of government agencies, on the ground that parties seeking to petition those agencies "should have known" of the illegality or impropriety of the relief they were seeking. *See Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1500 (5th Cir. 1985); *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F.Supp. 892, 916 (D. Md. 1985), *aff'd per curiam*, 786 F.2d 202 (4th Cir. 1986). These consequences are plainly unacceptable, and VIP's novel test therefore could not have been enunciated by the Court of Appeals.

CONCLUSION

For all the reasons set forth above, VIP's petition should be denied in all respects.

Dated: May 24, 1989

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